

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 88-110

Decided March 31, 1988

Interlocutory appeal by the Office of Surface Mining Reclamation and Enforcement from an Order of Administrative Law Judge David Torbett (Hearings Division Docket No. NX 6-41-R), denying a motion to dismiss an application for review as untimely.

Permission to appeal granted; order reversed; case remanded.

1. Appeals: Generally--Rules of Practice: Appeals: Generally--Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally--Surface Mining Control and Reclamation Act of 1977: Appeals: Generally

Where an Administrative Law Judge has made an interlocutory ruling that an applicant's failure to file its application for review timely did not deprive him of jurisdiction over the matter, and where the judge has considered and denied OSMRE's request that this question be certified to the Board of Land Appeals under 43 CFR 4.1124, OSMRE's petition for permission to appeal the interlocutory ruling to the Board under 43 CFR 4.1272(a) is properly granted, because resolution of this question will materially advance disposition of the case.

2. Administrative Procedure: Administrative Law Judges--Appeals: Jurisdiction--Hearings--Rules of Practice: Appeals: Generally--Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally--Surface Mining Control and Reclamation Act of 1977: Appeals: Generally--Surface Mining Control and Reclamation Act of 1977: Hearings: Generally

It is improper to impose a time limit on raising the question of a lack of jurisdiction of OHA, and any pending administrative review proceeding must be

dismissed (either by an Administrative Law Judge or the Board of Land Appeals) upon discovery that OHA lacks jurisdiction. The obligation to dismiss the proceeding applies whether or not the lack of jurisdiction was affirmatively raised by a party, and a party's failure to assert lack of jurisdiction at the beginning of administrative review will not result in a waiver of its right to do so at a later time or diminish the obligation of the administrative forum to dismiss the proceeding.

3. Administrative Procedure: Administrative Law Judges--
Administrative Procedure: Hearings--Hearings--Surface Mining
Control and Reclamation Act of 1977: Administrative Procedure:
Generally--Surface Mining Control and Reclamation Act of 1977:
Hearings: Generally

Where an application for review is not filed within 30 days of receipt of a notice of violation or cessation order (as expressly required by 43 CFR 4.1162(a)), OHA is deprived of jurisdiction to consider the application. It is error for an Administrative Law Judge not to dismiss an application for review filed with the Hearings Division after the time prescribed for such applications.

APPEARANCES: R. Anthony Welch, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement; Michael L. Warren, Esq., Barbourville, Kentucky, for petitioners.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

On November 14, 1985, an inspector from the Office of Surface Mining Reclamation and Enforcement (OSMRE) issued cessation order (CO) No. 85-81-225-03 to James Fisher, Danny Dean, Mark E. McPeck, Keith Jones, and McPeck Mining, stating that they had conducted surface mining activities without a valid surface disturbance permit and had encroached upon property managed by the Forest Service, U.S. Department of Agriculture. The cessation order bears the signature of Mark E. McPeck acknowledging service of the CO on November 14, 1985. On February 4, 1986, 82 days later, McPeck Mining and Mark McPeck (applicants) filed an application for formal review of the CO under 43 CFR Part 4.

On February 28, 1986, OSMRE, through counsel, filed its answer to the application, along with a motion to dismiss the application, citing as grounds applicants' failure to enclose a copy of the cessation order with its application for review as required by 43 CFR 4.1164. By order dated April 7, 1986, Administrative Law Judge Torbett denied OSMRE's motion to dismiss and subsequently set the matter for hearing in November 1987.

On October 14, 1987, OSMRE filed a second motion to dismiss, noting that the application for review was untimely, as it had not been filed within 30 days of service of the cessation order. 1/ Accordingly, OSMRE argued, Judge Torbett lacked jurisdiction to take evidence or consider the application. Alternatively, OSMRE urged in its motion that, if he did not dismiss the application for lack of jurisdiction, Judge Torbett should certify the issue of jurisdiction to this Board under 43 CFR 4.1124.

On October 26, 1987, Judge Torbett issued an order denying both OSMRE's motion to dismiss and its request to certify the issue of jurisdiction to this Board. In denying the motion to dismiss, Judge Torbett ruled as follows:

It is the opinion of the undersigned that [OSMRE] must file a motion for dismissal for lack of jurisdiction immediately upon being cognizant that this defense is available. Because the pleading of the Applicant set out that its petition was filed late and this pleading would be binding on the Applicant there is no question that [OSMRE] should have been aware immediately of the defense of lack of jurisdiction. [OSMRE] by its actions has waived its right to interpose the defense of lack of jurisdiction in this case. 43 CFR | 4.1112(c). To decide otherwise would create an untenable situation wherein [OSMRE] at any stage in any proceeding could decide to interpose the defense of lack of jurisdiction.

In denying the request for certification, Judge Torbett expressed his opinion that granting the request would not materially advance the ultimate disposition of the matter, but would rather "lead to a contrary result."

On November 20, 1987, OSMRE filed with Judge Torbett a "petition for review" of his order of October 26, 1987, seeking review of this order by this Board. No copy was filed with this Board, and Judge Torbett did not forward OSMRE's petition to us. Subsequently, on December 2, 1987, OSMRE filed a second "petition for review" directly with this Board. 2/

[1] If a party has sought certification of a question under 43 CFR 4.1124, that party may petition the Board for permission to appeal from an

1/ Counsel for OSMRE incorrectly stated in the motion that service of the cessation order was made "over one year prior to" the filing of the application for review. As noted above, service of the cessation order actually predated the filing of the application for review by some 82 days.

2/ This petition was mailed in an envelope addressed to "Interior Board of Land Appeals, Hearings Division, U. S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203." OSMRE is reminded that the Board of Land Appeals is a component of the Office of Hearings and Appeals (OHA), distinct from the Hearings Division. The correct addresses of the Hearings Division and the Board of Land Appeals are set out in 43 CFR 4.1107(a) and (c), respectively.

interlocutory ruling by an Administrative Law Judge. 43 CFR 4.1272(a). The Board may grant the petition if the correctness of the ruling sought to be reviewed involves a controlling issue of law, the resolution of which will materially advance final disposition of the case. 43 CFR 4.1272(c).

Here, OSMRE did seek certification from Judge Torbett of the question of whether applicants' failure to file their application for review timely deprived him of jurisdiction over the matter, and, by denying OSMRE's motion to dismiss, Judge Torbett has made an interlocutory ruling on this point. Further, resolution of this issue will materially advance disposition of the case, for if OSMRE is correct that there is no jurisdiction, there would be no authority to conduct a hearing or issue a decision, and further action by Judge Torbett would be unnecessary. OSMRE's petition for permission to appeal is granted. ^{3/}

The basis of Judge Torbett's decision not to dismiss the application, notwithstanding its evident untimeliness, was that OSMRE had waived its right to interpose the defense of lack of jurisdiction in this case, owing to its having failed to file its motion for dismissal immediately upon becoming cognizant that this defense was available. In support of his holding, Judge Torbett cited 43 CFR 4.1112(c), which provides that failure to make a timely motion or to file a statement in response may be construed as a waiver of objection.

It is established that, where an application for review is not filed within 30 days of receipt of a notice of violation or cessation order (as expressly required by 43 CFR 4.1162(a)), Administrative Law Judges and the Board of Land Appeals are deprived of jurisdiction to consider the application. 43 CFR 4.1162(b); P & K Coal Co. v. OSMRE, 98 IBLA 26, 33 (1987); Coal Energy, Inc. v. OSMRE, 94 IBLA 347 (1986); Green Coal Co., 2 IBSMA 199, 87 I.D. 362 (1980). In the preamble to the rulemaking that amended 43 CFR 4.1162, the Under Secretary expressly reaffirmed Departmental policy that compliance with time limits for initiating administrative review is a "jurisdictional prerequisite" to administrative review. 51 FR 16319, 16320 (May 2, 1986).

It is therefore improper to impose a time limit for raising the question of a lack of jurisdiction of OHA (including a motion to dismiss an application for review as untimely filed). Further, any pending administrative review proceeding must be dismissed, either by an Administrative Law Judge or this Board, if the facts show that OHA lacks jurisdiction to hear and decide the case. The obligation to dismiss the proceeding applies whether or not the lack of jurisdiction was affirmatively raised by any of the parties, and failure to assert lack of jurisdiction at the beginning of administrative review will not result in a waiver of the right to do so at a later time or diminish the obligation of the administrative forum to dismiss

^{3/} The Board has discretion, upon granting a petition for interlocutory appeal, to dispense with briefing. 43 CFR 4.1272(d). As the issue here is governed by very well-settled precedent, we perceive no need for briefing.

the proceeding. Thus, it was improper for Judge Torbett to deny as untimely OSMRE's motion to dismiss of October 14, 1987. 4/

[3] There is no dispute that applicants did not file their application for review within 30 days of receipt of the cessation order. As discussed above, where an application for review is not filed within 30 days of receipt of a notice of violation or cessation order (as expressly required by 43 CFR 4.1162(a)), Administrative Law Judges and the Board of Land Appeals are deprived of jurisdiction to consider the application. 43 CFR 4.1162(b); P & K Coal Co. v. OSMRE, supra; Coal Energy, Inc. v. OSMRE, supra; Green Coal Co., supra. Further, it is error for an Administrative Law Judge not to dismiss an application for review filed with the Hearings Division after the time prescribed for such applications; the sanction of dismissal is mandatory. 43 CFR 4.1162(b); Green Coal Co., supra. Accordingly, Judge Torbett's order of October 26, 1987, is reversed.

Under 43 CFR 4.1272(h), this Board is directed to remand a case promptly to the Administrative Law Judge for further proceedings following decision on an interlocutory appeal. Thus, the case is being returned to Judge Torbett with instructions to dismiss the application for review as untimely.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the order appealed from is reversed, and the matter is remanded for dismissal.

Wm. Philip Horton
Chief Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

John H. Kelly
Administrative Judge

4/ The terms of 43 CFR 4.1112(c), that "[f]ailure to make a timely motion or to file a statement in response may be construed as a waiver of objection," which were cited by Judge Torbett, are not to the contrary. There is no time limit set out in the regulations for filing a motion to dismiss for lack of jurisdiction. As discussed above, no such time limit is appropriate.